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No. 84-268

SUPREME COURT OF THE UNITED STATES
October Term, 1984

A-1 KING SIZE SANDWICHES, INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION OF NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED FOR REVIEW

In light of Section 8(d) of the Labor Management Relations Act and this Court's holdings that the National Labor Relations Board cannot regulate the substantive terms of a collective bargaining agreement or impose its views on what terms a party must accept, did the Eleventh Circuit improperly enforce a Board bargaining order by holding that such order and the Board's finding of bad faith "surface" bargaining can be based exclusively on the substantive content of the Petitioner-Employer's bargaining proposals and on the Petitioner's failure to agree to certain Union proposals?

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343 U.S. 395 (1952) 4

ARGUMENT

The National Labor Relations Board (Board), in its brief in opposition, avoids the question presented in the petition for writ of certiorari and by the opinion of the Court of Appeals below. The Board's statement of the question presented changes the substance of the question presented in the petition for writ of certiorari. (Such a practice, if done in a brief on the merits, would violate Rule 34.1(a) of the rules of this Court). The Board's statement suggests that there is no issue other than whether there was substantial evidence to support the decision of the Administrative Law Judge (ALJ).

The Board's brief ignores the fact that the Petitioner seeks this Court's review of a judgment of the United States Court of Appeals, Eleventh Circuit, not of the decision of the ALJ and the Board. The criteria for deciding whether a writ of certiorari should issue are whether the decision of the Court of Appeals, not of the Board, conflicts with applicable decisions of this Court on a federal question or creates conflict with the decision of another federal court of appeals on the same matter. Rules of the Supreme Court 17.1(a) and (c).

The essence of the Board's claims are that there was evidence other than the substance and content of the Petitioner-employer's bargaining proposals which caused the ALJ, Board and Court of Appeals to hold that the Petitioner had bargained in bad faith. The Board argues that if evidence in addition to the substance and content of bargaining proposals was a factor in *its* ruling, the decision of the Court of Appeals is not in conflict with decisions of this Court and with decisions of other federal courts of appeals.

The Board, at page 6 of its brief, indicates agreement with the Petitioner that the holding of the Court of Appeals below was exclusively founded on the bargaining proposals of the Petitioner and the Petitioner's insistence on them. Defining the exact nature and limits of the issue considered and decided by the Court of Appeals below requires only the reading of its

statement of the issue:

> The question to be decided is a narrow one. Whether the content of the Company's bargaining proposals together with the positions taken by the Company are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement. We defer to the Board to make the initial determination, but *we are required to review the proposals* to determine whether the Board's findings are supported by substantial evidence on the record as a whole. Pet. A-10. (emphasis supplied)

The remainder of the opinion (Pet. A-11-18) shows that the court's exclusive rationale was that the Petitioner's bargaining proposals and its insistence on them were the basis, in and of themselves, for the Court's approval of the Board's inference of "bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable" and which "would have left the Union and employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification." Pet. A-16.

The Board argues, however, that *its* decision was based not only on bargaining proposals and positions taken on them but also on other evidence which indicated the "attitude" of the Petitioner toward collective bargaining. Opposition brief, page 9. This argument is not only irrelevent, because the review here sought is of the Court of Appeals' decision, but is also somewhat misleading. It is misleading because the ALJ, in his decision, did not rely on any evidence other than the Petitioner's bargaining proposals, its insistence on them and its refusal to accept some union proposals. The ALJ did *not* conclude with the language referred to in quotes at the bottom of page 9 of the opposition brief. The ALJ did mention

"statements indicative of Respondent's attitude toward collective bargaining." Pet. A-49. He did so, however, in stating the question before him, not in advancing his conclusion. His analysis of and conclusion on this question is limited exclusively and entirely to the nature and substance of the Petitioner's bargaining proposals, primarily its proposal on employee wages. Pet. A-47, A-49-56. *No mention is made of utterances or other conduct of the Petitioner other than statements related directly to what would or would not be written in a collective bargaining agreement.* The only "other evidence" to which the Board could be directing this Court's attention is in the first paragraph of Pet. A-56, in which the ALJ recounted discussions during bargaining of assertedly ungenerous or unfavorable conditions of employment which the Petitioner proposed at one time or another. These discussions, to the extent they were relied on by the ALJ, which is unclear, were *part* of the proposals considered unworkable or unreasonable, and are *not* conduct unrelated to the substance of bargaining proposals, and thus do not make the question presented broader than as stated in the petition. In this regard, it is important to note that the Court of Appeals began its analysis with the premise that there was no evidence that the Petitioner "engaged in any conduct away from the bargaining table that might tend to show it would not conclude an agreement with the Union." Pet. A-9.

Finally, it should be noted that the Board, while reaching into the ALJ's decision to try to broaden the question presented, did not question an assertion of the Petitioner which is central to this proceeding: that if the ruling of the court below is not set aside, the Petitioner will either have to make proposals more acceptable to the union and to the Board, or face charges of contempt. Just as this Court, in *H. K. Porter Company* v. *NLRB*, 397 U.S. 99, 104 - 105 (1970), (as recognized by the Board, Opposition brief, page 8), held that the Board lacks power to order a party to agree to a particular contract article, the Board similarly lacks authority to order a party to grant any terms or conditions to another party. *Ibid.* This Court, in *Porter* and in

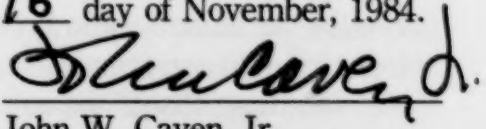
NLRB v. *American Insurance Company*, 343 U.S. 395 (1952), anticipated the claims made in the Board's opposition brief by stating that the Board "may not, either directly *or indirectly*, compel concessions or *otherwise sit in judgment* upon the substantive terms of collective bargaining agreements." (emphasis supplied). *Porter*, 397 U.S. 106; *American*, 343 U.S. 404. The Court of Appeals' ruling that the Petitioner violated §8(a)(5) of the Act by making and adhering to "unworkable" proposals, if not set aside, will force the Petitioner to grant the Union more favorable terms. The Court of Appeals' decision thus creates a direct, exact and clear-cut conflict with *Porter* and *American*, as well as with the federal appellate decisions cited at Pet. A-8-11.

CONCLUSION

For the reasons above set forth, it is respectfully and earnestly submitted that the question presented is exactly as presented in the petition for writ of certiorari.

It is respectfully urged that a writ of certiorari be directed to the United States Court of Appeals for the Eleventh Circuit so that the conflicts may be resolved.

Respectfully submitted, this
16 day of November, 1984.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the within and foregoing has been furnished by U.S. Mail from Jacksonville, Florida this 16 day of November, 1984 to all parties required to be served by and otherwise as required by Rule 28.4(a) and .5, Rules of the Supreme Court. The following parties were thus served.

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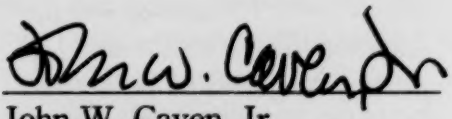

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